STATE OF CALIFORNIA
DEPARTMENT OF INSURANCE
45 FREMONT STREET, 21st FLOOR
SAN FRANCISCO, CALIFORNIA 94105

RH-399

Fair Claims Settlement Practices Regulations
Response to Comments on Revised Amendments

Comments RE: RH 399, generally

Comment No.: **14**
Section: **RH 399, generally**
Commentator: Richard Wooley, California Applicants' Attorneys Association
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The newest version of the regulations continues to exclude workers' compensation ("WC") from the Department's oversight. The Department of Industrial Relations' ("DIR") Division of Workers' Compensation has drastically cut its audit staff due to the current budget crisis. DIR will not, in the foreseeable future, be able to oversee claims behavior by WC carriers. WC carriers should be included in these regulations.

Response to Comment: The Commissioner has considered this comment and rejects it as it is outside the scope of the proposed rulemaking. Pursuant to Government Code Section 11347, the commentator may petition the Department requesting the adoption, amendment or repeal of a regulation.

Comments RE: Section 2695.1, generally

Comment No.: **7**
Section: **Section 2695.1, generally**
Commentator: John Metz
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comments: My suggested changes relating to workers' compensation and professional malpractice of health care providers should be adopted.

Response to Comment: The Commissioner has considered this comment and rejects it as it is outside the scope of the proposed rulemaking. Pursuant to Government Code Section 11347, the commentator may petition the Department requesting the adoption, amendment or repeal of a regulation.

Comments RE: Section 2695.1(b)

Comment No.: **10**
Section: **2695.1(b)**
Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: This section lacks clarity and specificity because it refers to practices not specifically delineated in this set of regulations as also potentially constituting unfair claim settlement practices. This language is insufficient notice to insurers as to what will or will not be considered an unfair claim settlement practice. This proposed change is substantive and should be the subject of a public hearing.

Response to Comment: The Commissioner has considered this comment and rejects it.
The clarifying language in the subsection relates back to Insurance Code Section 790.06. This section, part of the Unfair Practices Act ("UPA") clearly states that acts or practices not specified in Insurance Code Section 790.03 may, nevertheless, be unfair. Under Insurance Code Section 790.10, the Commissioner is authorized to promulgate regulations to administer the UPA.

Regarding the "substantive change" comment, California Government Code Section states, in pertinent part:

> "No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c).

Comment No.: **12**
Section: **2695.1(b)**
Commentator: Samuel Sorich, National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The deletion of the reference to Insurance Code Section 790.06 is unnecessary and creates an inconsistency between the regulations and the Insurance Code and could lead to the commissioner's prosecuting undefined violations without following the statutory procedures established by the Legislature. There is no authority for the commissioner

to take an enforcement action against an undefined unfair act unless the commissioner proceeds under Section 790.06.

Response to Comment: The Commissioner has considered this comment and rejects it.
The clarifying language in the subsection refers to Article 6.5 of Division 1, Part 2, Chapter 1 of the Insurance Code, which includes Insurance Code Section 790.06. This section, part of the Unfair Practices Act ("UPA") clearly states that acts or practices not specified in Insurance Code Section 790.03 may, nevertheless, be unfair. Under Insurance Code Section 790.10, the Commissioner is authorized to promulgate regulations to administer the UPA, including Section 790.06.

Comment No.: **9**
Section: **2695.1(b)**
Commentator: Kent Keller, Barger & Wolen
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The revised regulation still provides that methods, acts or practices not mentioned in the regulations may also be unfair claims settlement practices. The regulations would allow the Department to take action against insurers based on practices not prohibited by or even addressed by the regulations.

Response to Comment: The Commissioner has considered this comment and rejects it.
The revised language refers to Article 6.5 of Division 1, Part 2, Chapter 1 of the Insurance Code, which includes Insurance Code Section 790.06. Section 790.06, part of the Unfair Practices Act ("UPA") clearly states that acts or practices not specified in Insurance Code Section 790.03 may, nevertheless, be unfair. Under Insurance Code Section 790.10, the Commissioner is authorized to promulgate regulations (such as this revision) to administer the UPA, including Section 790.06.

Comments RE: Section 2695.1(c)

Comment No.: **13**
Section: **2695.1(c)**
Commentator: Marilyn Klinger, Sedgwick, Detert, Moran & Arnold on behalf of The Surety Association of America
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The effect of the proposed amendment is to delete the current partial exemption from the regulations for claims under surety bonds. The amended language treats claims under surety bonds identically to those under indemnity policies and fails to recognize the unique tripartite relationship (between the surety, principal and beneficiary) that exists under surety bonds.

Response to Comment: The Commissioner has considered and rejects this comment. As no additional changes to this subsection have been made, these comments (which duplicate the comments made on May 8, 2002, the Department's responses to which are part of the Rulemaking file) are outside the scope of the proposed rulemaking.

Comments RE: Section 2695.1(d)

Comment No.: **1**
Section: **2695.1(d)**
Commentator: Sean E. McCarthy, Stoel Rives LLP, on behalf of Home Warranty Association of California ("HWAC")
Date of Comment: November 13, 2002
Type of Comment: Written

Summary of Comment: The Fair Claims Settlement Practices Regulations ("FCSPR") do not apply to home protection companies because home protection companies are comprehensively regulated by the Home Protection Act.

Response to Comment: The Commissioner has considered this comment and rejects it. As no additional changes to the text of the originally proposed regulations have been made regarding home warranty, these comments are outside the scope of the proposed rulemaking. The comments submitted are essentially the same as those which the commentator submitted on May 7, 2002 in response to the Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing. The Department's response to Mr. McCarthy's May 7, 2002 comments is contained in the Rulemaking file.

Comment No.: **2**
Section: **2695.1(d)**
Commentator: Mark F. Lightfoot
Date of Comment: November 15, 2002
Type of Comment: Written

Summary of Comment: As home protection contracts and service are completely different from insurance, these regulations should not apply to them.

Response to Comment: Insurance Code Section 12743 specifies that the Unfair Practices Act (Sections 790.1 through .10) apply to home protection companies. Under Section 790.10, the Commissioner has clear authority to adopt regulations that are applicable to both insurers and home protection companies. As Insurance Code Section 12743(k) specifies, in the event of any conflict between the Unfair Practices Act and the Home Protection Act (commencing with Insurance Code Section 12740), the Home Protection Act prevails.

Comments RE: Section 2695.1(e)

Comment No.: **10**

Section: **2695.1(e)**
Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The proposed changes to this section do not fully remove its earlier defect – that it seeks to dictate policy provisions where no statute so authorizes. The proposed changes exceed statutory authority and are substantive changes that should be the subject of a public hearing.

Response to Comment: The Commissioner has considered this comment and rejects it.
The amended language clarifies that policy provisions regarding claims must be consistent with or more favorable to the insured than the regulations. Under Insurance Code Section 790.10, the Commissioner is authorized to promulgate regulations to administer the UPA.

Regarding the "substantive change" comment, California Government Code Section states, in pertinent part:

> "No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c).

Comment No.: **12**
Section: **2695.1(e)**
Commentator: Samuel Sorich, National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The revision does not address the fundamental issue of the Department's lack of authority to mandate policy provisions.

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not mandate specific policy provisions but, rather, specifies that provisions in a policy that relate to claims must be consistent with or more favorable to the insured than these regulations.

Comment No.: **11**
Section: **2695.1(e)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California
Date of Comment: November 25, 2002

Type of Comment: Written

Summary of Comment: The revision is still problematic in that the Department does not have the authority to mandate policy provisions.

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not mandate specific policy provisions but, rather, specifies that provisions in a policy that relate to claims must be consistent with or more favorable to the insured than these regulations.

Comment No.: **9**
Section: **2695.1(e)**
Commentator: Kent Keller, Barger & Wolen
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The revision does not address the fundamental problem with this proposed subsection, that the Unfair Practices Act does not give the Department authority to dictate policy provisions.

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not mandate specific policy provisions but, rather, specifies that provisions in a policy that relate to claims must be consistent with or more favorable to the insured than these regulations.

Comment No.: **8**
Section: **2695.1(e)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The proposed amendments perpetuate CDI's attempt to dictate policy contract terms and minimum standards of coverage not authorized by statute.

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not mandate specific policy provisions but, rather, specifies that provisions in a policy that relate to claims must be consistent with or more favorable to the insured than these regulations.

Comments RE: Section 2695.2, generally

Comment No.: **7**
Section: **Section 2695.2, generally**
Commentator: John Metz
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comments: The failure to adopt my suggested changes will lead to needless confusion and harm to consumers.

Response to Comment: The Commissioner has considered this comment and rejects it. The commentator is referred to the Commissioner's responses to his April 30, 2002 comments on this section.

Comments RE: Section 2695.2(d)

Comment No.: 15

Section: 2695.2(d)
Commentator: Douglas B. Jackson, RPA, Southwest Claims Service, Inc.
Date of Comment: November 27, 2002
Type of Comment: Written

Summary of Comment: The commentator suggests language to close a loophole used by insurers to avoid using either their own claims agents or licensed insurance adjusters. Insurers send out contractors or restoration firms to claimants' homes not to value the damages to perform adjustment functions without having to incur an adjustment expense.

Response to Comment: The Commissioner has considered the comment and rejects it as it is outside the scope of the proposed rulemaking.

Comments RE: Section 2695.2(s)

Comment No.: 5
Section: 2695.2(s)
Commentator: Jeffrey D. Hathaway, Interinsurance Exchange of the Automobile Club
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The change to the definition of "proof of claim" creates uncertainty as to when proof of claim has been established so as to trigger the running of certain time limits specified in the regulations. Removing the phrase "or any evidence" clarifies the provision by requiring that information in the claimant's possession be submitted to the insurer to establish "proof of claim." As currently written, it is possible for "proof of claim" to be established by information of which the insurer is unaware because it is only in the claimant's possession and has been withheld from the insurer.

Response to Comment: The Commissioner has considered this comment and accepts it. The proposed amendment to Section 2695.2(s) now reads as follows:

(s) "Proof of claim" means any evidence or documentation in the claimant's possession or any evidence submitted to or received by the insurer or other evidence that the insurer discovers in the course of its investigation which provides any evidence of the claim and that reasonably supports the claim magnitude or the amount of the claimed loss.

Comment No.: **3**
Section: **2695.2(s)**
Commentator: Michael J. Cassanego, 21st Century Insurance Company
Date of Comment: November 22, 2002
Type of Comment: Written

Summary of Comment: The change in the definition makes evidence in the claimant's possession "proof of claim" even if not communicated to the insurer. This is a substantive change that requires a hearing.

Response to Comment: The Commissioner has considered this comment, accepts it in part and rejects it in part. Regarding the "substantive change" comment, California Government Code Section states, in pertinent part:

> "No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c).

Regarding the specific proposed language, the Commissioner agrees that the proposed language is unclear. The proposed amendment to Section 2695.2(s) will read as follows:

(s) "Proof of claim" means any evidence or documentation submitted to or received by the insurer or other evidence that the insurer discovers in the course of its investigation which provides any evidence of the claim and that reasonably supports the claim magnitude or the amount of the claimed loss.

Comment No.: **10**
Section: **2695.2(s)**
Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The addition of the language "or other evidence that the insurer discovers in the course of its investigation" does not cure the provision's lack of clarity.

Response to comment: The Commissioner has considered this comment and accepts it. Section 2695.2(s) will now read as follows:

> (s) "Proof of claim" means any evidence or documentation submitted to or received by the insurer or other evidence that the insurer discovers in the course of its investigation which provides any evidence of the claim and that reasonably supports the claim magnitude or the amount of the claimed loss.

Comment No.: **12**
Section: **2695.2(s)**
Commentator: Samuel Sorich, National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The amendment allowing "evidence" as an alternative to "documentation" and the deletion of the standards of "magnitude or the amount of the claimed loss" create ambiguity and invite arbitrary enforcement.

Response to Comment: The Commissioner has considered this comment and rejects it. The word "evidence is not ambiguous as the definition specifies that not just any evidence will be considered part of proof of claim but only evidence that "reasonably supports the claim."

Summary of Comment: The revision keeps the provision that makes evidence in the claimant's possession a "proof of claim" even if not communicated to the insurer. An insurer cannot be expected to accept or deny a claim when the insurer receives no evidence or documentation and all evidence or documentation on the claim is in the claimant's possession.

Response to Comment: The Commissioner has considered this comment and accepts it. Section 2695.2(s) will now read as follows:

> (s) "Proof of claim" means any evidence or documentation submitted to or received by the insurer or other evidence that the insurer discovers in the course of its investigation which provides any evidence of the claim and that reasonably supports the claim magnitude or the amount of the claimed loss.

Comment No.: **11**
Section: **2695.2(s)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The revision still defines "proof of claim" to include information in the claimant's possession that has not been provided to the insurer.

Response to Comment: The Commissioner has considered this comment and accepts it. Section 2695.2(s) will now read as follows:

> (s) "Proof of claim" means any evidence or documentation submitted to or received by the insurer or other evidence that the insurer discovers in the course of its investigation which provides any evidence of the claim and that reasonably supports the claim magnitude or the amount of the claimed loss.

Summary of Comment: The deletion of the phrase "magnitude or the amount of the claimed loss" indicates confusion between the terms "proof of loss" and "notice of loss." The commentator suggests amended language.

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not blur the distinction between these two concepts. In providing proof of claim, the claimant necessarily provides evidence that reflects what the claim is worth.

Comment No.: **9**
Section: **2695.2(s)**
Commentator: Kent Keller, Barger & Wolen
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The change in the definition makes evidence in the claimant's possession "proof of claim" even if not communicated to the insurer. This is a substantive change that requires a hearing.

Response to Comment: The Commissioner has considered this comment and accepts it. Section 2695.2(s) will now read as follows:

> (s) "Proof of claim" means any evidence or documentation submitted to or received by the insurer or other evidence that the insurer discovers in the course of its investigation which provides any evidence of the claim and that reasonably supports the claim magnitude or the amount of the claimed loss.

Summary of Comment: The Department attempts to make any evidence at all related to the claim constitute proof of claim, essentially making proof of claim equal to notice of claim.

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not blur the distinction between these two separately defined concepts.

Comment No.: **8**
Section: **2695.2(s)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The proposed language blurs the meaning of "proof of claim" and "notice of claim."

Response to Comment: The Commissioner has considered this comment and rejects it. The revision does not blur the distinction between these two concepts that are separately defined in the regulations.

SECTION 2695.3

Comment No.: **7**
Section: **2695.3**
Commentator: John Metz
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Resubmits comments submitted on 4/30/02 and asks for reconsideration.

Response to comment: The Commissioner has considered the comment and rejects it. The comment is outside the scope of the rulemaking.

SECTION 2695.4

Comment No.: **11**
Section: **2695.4(a)**
Commentator: G. Diane Colborn, Personal Insurance Federation
Date: November 25, 2002
Type of Comment: Written
Also commented by: Jeffrey D. Hathaway, Interinsurance Exchange of the Automobile Club
Comment No.: **5**
Date: November 25, 2002
Type of Comment: Written
Also commented by: Steve McManus, State Farm Insurance Companies
Comment No.: **8**
Date: November 25, 2002
Type of Comment: Written
Also commented by: Kent R. Keller, Robert W. Hogeboom, Robert J. Cerny, Barger & Wolen LLP, attorneys for 21st Century Insurance Company
Comment No.: **9**
Date: November 25, 2002
Type of Comment: Written
Also commented by: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Comment No.: **10**
Date: November 25, 2002
Type of Comment: Written

Also commented by: Samuel Sorich, National Association of Independent Insurers
Comment No.: **12**
Date: November 25, 2002
Type of Comment: Written

Summary of Comment: Requiring disclosure of any pertinent statutes and regulations that "may" apply to the claim, whether or not the insurer relied on them, is not authorized by statute, may require insurers to practice law without a license and provide legal advice to claimants, and may violate the clarity standard. At the very least, the "or" should be changed to "and" in the last line, to narrow the disclosure to statutes and regulations relied on by the insurer.

Moreover, the new, broader disclosure requirement is likely to confuse insurance consumers. Finally, the proposal seeks to hold insurers to an impossible performance standard that lacks necessity.

Response to Comment: The commissioner has considered the comment and rejects it. The requirement is to provide information, not advice or counsel. The information to be provided already is, or should be, within the knowledge of those who provide training in claims handling. The requirement does not include disclosing legal opinions, legal analyses, attorney work-product or any other privileged information.

The intent of the regulation is to shed light on the factors necessary to the claims settlement process so that claimants will be adequately apprised of their rights and obligations, and (2) litigation might be avoided through claimants' and beneficiaries' better understanding of the process. It is the commissioner's belief that the proposal will accomplish these goals.

Comment No. 12

Commentator: Samuel Sorich, Association of California Insurance Companies
Date: November 25, 2002
Type of Comment: Written

Summary of Comment: Insurance Code section 790.03(h) prohibits "knowing" misrepresentation of policy provisions. As proposed, this subsection prohibits any misrepresentation, whether knowingly made or not. Therefore, the regulation is inconsistent with the statute.

Response to Comment: The commissioner has considered the comment and rejects it. It is implicit in this subsection that an "unknowing" misrepresentation is not a violation unless it is performed so frequently as to constitute a business practice.

Comment No. 13

Commentator: Marilyn Klinger, Sedgwick, Detert et al. For The Surety Association of America
Date: November 25, 2002

Type of Comment: Written

Summary of Comment: Written comments submitted May 8, 2002, are incorporated herein by reference.

Response to Comment: The commissioner has considered the comment and rejects it. Responses to May 8, 2002, written comments are incorporated herein by reference.

Section 2695.4(a)(1)

Comment No. 8

Commentator: Steve McManus, State Farm Insurance Companies
Date: November 25, 2002
Type of Comment: Written

Summary of Comment: The proposed change has increased the difficulty of compliance. Insurance Code Section 790.03(h)(2) requires insurers to act "reasonably promptly" upon communications with respect to claims. Requiring "immediate" notification of the insured when additional benefits might be payable under a policy was problematic but at least had a "trigger" in the receipt of additional proofs of claim. Now the trigger has been deleted. These proposed changes should be scrapped as they are lacking in clarity, necessity and authority.

Response to Comment: The commissioner has considered the comment and rejects it. Implicit in the regulation as now proposed is the requirement of immediate notification upon recognition by the insurer that additional benefits might be payable.

SECTION 2695.5(b)

Comment No.: **7**
Section: **2695.5(b)**
Commentator: John Metz
Date of comment: 1/25/02
Type of comment: Written

Summary of comment: Resubmits comments submitted on 4/30/02 and asks for reconsideration.

Response to comment: The Commissioner considered the comment and rejects it. The comment is outside the scope of the rulemaking.

Comment No.: **11**
Section: **2695.5(b)**

Commentator: Personal Insurance Federation of California (PIF), Diane Colborn
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: PIF supports the change to this section, which addresses the clarity concerns and over-breadth of the language as previously proposed.

Response to comment: The Commissioner has considered the comment and thanks the commentator for its support. However, it should be noted that no language has been changed from the earlier version of the regulations.

SECTION 2695.7(b)

Comment No.: **8**
Section: **2695.7(b)**
Commentator: State Farm Insurance Companies, Steve McManus
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: The proposed amendments to this subsection are helpful, but it does not go far enough because it does not address claims that are partially denied. In addition the proposed language is not statutorily authorized, and is also unnecessary and harmful to consumers.

Response to comment: The Commissioner has considered the comment and rejects. The comment is outside the scope of the rulemaking.

Comment No.: **16**
Section: **2695.7(b)**
Commentator: Amy Bach
Date of Comment: 12/4/02
Type of Comment: Written

Summary of comment: Supports proposed amendments to this section.

Response to comment: The Commissioner has considered the comment and appreciates the commentator's support.

Section 2695.7(d)

Comment No.: **7**
Section: **2695.7(d)**
Commentator: John Metz
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Resubmits comments submitted on 4/30/02 and asks for reconsideration.

Response to comment: The Commissioner has considered the comment and rejects it. The comment is outside the scope of the rulemaking.

Section 2695.7(f)

Comment No: **13**
Section: **2695.7(f)**
Commentator: Sedgwick, Detert, Moran & Arnold, Surety Association of America
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: There is an inconsistency and a redundancy between the proposal combining sections 2695.4(a) and 2695.4(b) and the proposed Section 2695.7(f).

Response to comment: The Commissioner has considered the comment and rejects it. The comment is outside the scope of the rulemaking.

Section 2695.7(h)

Comment No.: **6**
Section **2695.7(h)**
Commentator: Mercury Insurance Group, Douglas L. Hallett
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Resubmitted same comments as May 8 and February 19, 2002 and asks for further consideration. Feels department is proposing regulations outside its authority.

Response to comment: The Commissioner has considered the comment and rejects it. The comment is outside the scope of the rulemaking.

Section 2695.7(n)

Comment No. **8**
Section: **2695.7(n)**
Commentator: **State Farm Insurance Companies, Steve McManus**
Date of comment: **11/25/02**
Type of comment: **Written**

Summary of comment: Insurers are permitted to request a medical examination only if they have a good faith "belief" that the examination is "reasonably necessary". This standard is ambiguous and fails to give insurers clear guidance. Individual and corporate beliefs are subjective. Insurers use the independent medical examination as an audit tool to assist in fraud prevention. The exam is performed to ascertain whether the medical treatment received is

reasonable and medically necessary. The decision to order an examination should be left to the discretion of the insurer for the purpose of ascertaining whether the claimant is receiving medically necessary treatment, customary and appropriate for the alleged injury. For these reasons, and more, the language in place today should remain in this subsection.

Response to comment: The Commissioner has considered the comment and rejects it. Nothing in the proposed language prevents an insurer from using the medical examination as an audit tool to assist in fraud prevention. The term "reasonable" is commonly utilized in both the insurance and legal professions. The proposed language intends to set a guideline without enumerating each and every method an insurer must use in order to determine that a medical examination is reasonably necessary. Whether or not a medical examination is "reasonably" necessary will vary on a case by case basis. The language intends to give the insurer some flexibility.

Section 2695.7(q)

Comment No. **8**
Section: **2695.7(q)**
Commentator: State Farm Insurance Companies, Steve McManus
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Agrees with the new proposed language but suggests that surety bonds also be excluded from this subsection because the right to subrogate on surety claims arises from common law.

Response to comment: The Commissioner has considered the comment and rejects it. This subsection applies to "first party claimants" only which, by definition, does not include beneficiaries/claimants under a surety bond.

Comment No.: **9**
Section: **2695.7(q)**
Commentator: Barger & Wolen LLP, Kent R. Keller
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Agrees with the principle of the revisions but find the language ambiguous because it is not clear that the exemption applies to one loss under multiple policies. Suggests the follow language:

"This subsection shall not apply when multiple insurers have issued policies to the insured covering the same loss and the language of these contracts prescribe alternative subrogation rights."

Response to comment: The Commissioner has considered the comment and accepts it. The suggested language will added.

Comment No.: **11**
Section: **2695.7(q)**
Commentator: Personal Insurance Federation of California (PIF), Diane Colborn
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: The changes are overbroad, lack clarity, and statutory authority. The proposed new language provides that the section shall not apply when "multiple policies have been issued…". It is unclear why this exception should be limited to cases where multiple policies have been issued. If an insurance contract prescribes alternative subrogation rights, then the provisions of the contract should apply. CDI does not have the authority to dictate the terms of subrogation rights through regulations.

Response to comment: The Commissioner has considered the comment and rejects it. The new language intends to accommodate the special needs of large commercial insureds that may require multiple policies in order to obtain adequate coverage. In such instances, it may also be necessary to modify the common subrogation language in property policies to address the complexities of such insurance arrangements. For instance, in cases wherein 5 policies may be layered to cover a particular property exposure, the subrogation language may be modified to allow the excess insurers to receive and retain subrogation without taking the responsibility for recovering the insured's deductible. This type of insurance arrangement is the only situation in which the insured's deductible interests should not be protected by regulation.

Section 2695.7(s)

Comment No.: **5**
Section: **2695.7(s)**
Commentator: Interinsurance Exchange of the Automobile Club, Geoffrey Hathaway
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: The accuracy of computerized data bases used to "establish the value of a claim" could be reasonably addressed by amending the second sentence to read: 'insurers choosing to use data from a computerized data base source or other source shall take reasonable steps to ensure the accuracy of the data they use…'

In the third sentence, the word "evaluating" should be changed to "establish the value of" in order to be consistent with the change made in the first sentence.

Response to comment: The Commissioner has considered the comment and rejects it. The suggested language does not add clarity to the intent of the proposed regulation.

Comment No.: **8**
Section: **2695.7(s)**
Commentator: State Farm Insurance Companies, Steve McManus

Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Agrees with amended language exempting from responsibility for the accuracy of data contained in government records however, insurers do not have practical control over many other independent data bases. To hold insurers responsible for the accuracy of data used in any source used to establish the value of an insurance claim is without statutory authority, and is arbitrary and capricious. For example, an insurer may not use the Kelley Blue book as a source for establishing the value of a claim, but if a claimant submits a Kelley Blue book estimate of value, the insurer must consider the document.

Response to comment: The Commissioner has considered the comment and rejects it. The language in the subsection holds insurers responsible for the data used by the insurer to establish the value of a claim as the insurer holds a superior position during the claims settlement process. Additionally, the proposed language only requires that an insurer "consider" "credible" evidence presented by the claimant to support the actual value of the claim. This does mean that the alleged Kelley Blue book document submitted by the claimant must be completely accepted by the insurer.

Comment No.: **10**
Section: **2695.7(s)**
Commentator: California State Automobile Association, Douglas A. Lutgen
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: To be consistent with the wording change in the first sentence, the word "establishing" should be substituted for the word "evaluating" in the third sentence.

Response to comment: The Commissioner has considered the comment and rejects it. The language is not inconsistent. The two sentences complement each other. To accept the commentator's suggestion and use the word "establishing" in the third sentence would change the meaning of the regulation.

Summary of comment: The added language in the fourth sentence of the section refers to evidence presented "by the claimants". The insurer should not be so restricted and should be required to consider any credible evidence, from whatever source. The commentator suggests the following language "An insurer shall consider any credible evidence in evaluating the actual value of the claim."

Response to comment: The Commissioner has considered the comment and rejects it. The insurer is not restricted and nothing precludes the insurer from considering any credible evidence from whatever source.

Comment No.: **12**
Section: **2695.7(s)**
Commentator: Association of California Insurance Companies, Samuel Sorich

Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Proposed language introduces a new standard that was not in the 3/15/02 text. The original text related accuracy to data used to "evaluate" claims. The 11/7/02 change introduces the idea of accuracy of data used to "establish the value" of claims. The proposed section is unreasonable, unauthorized and inconsistent with existing statutes and regulations and should not be adopted. If the Department proceeds with the adoption, the section should be corrected so that "establish" is the consistent standard throughout the section.

In addition, the added fourth sentence requires an insurer to consider credible evidence presented by the claimant which the commentator feels is too limited. An insurer should be required to consider credible evidence from whatever sources.

Response to comment: The Commissioner has considered the comment and rejects it. The language is not inconsistent. To accept the commentator's suggestion and use the word "establishing" throughout the subsection would change the meaning of the regulation. Further, an insurer is not restricted and nothing precludes an insurer from considering any credible evidence from whatever source. See response to CSAA

Section 2695.7(s)(1)

Comment No.: **3**
Section: **2695.7(s)(1)**
Commentator: 21st Century Insurance, Michael J. Cassanego
Date of comment: 11/22/02
Type of comment: Written

Summary of comment: Believes the revisions substantively change the regulations and require a full hearing. The logic behind this new concept and inconsistent standards for private industry and government should be part of a full hearing.

Response to comment: The Commissioner has considered the comment and rejects it. While the proposed revisions are substantive, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing provides members of the directly affected public with notice that the subject changes could have resulted.

Comment No.: **10**
Section: 2695.7(s)(1)
Commentator: California State Automobile Association, Douglas A. Lutgen
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: The added language permits insurers to disregard data provided by governmental entities if that data has inaccuracies. This is inconsistent with Proposition 103 as implemented by existing CCR section 2632.5(c)(1)(A) which mandates that the insurer use the public record of motor vehicle violations as maintained by the DMV whether it is accurate or not. Further, this provision is substantive and should be subject to a public hearing.

Response to comment: The Commissioner has considered the comment and rejects it. The proposed language pertains specifically to the processing of claims whereas the requirements outlined in Proposition 103 and related regulations pertain to the underwriting process. Additionally, while the proposed revisions are substantive, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing provides members of the directly affected public with notice that the subject changes could have resulted.

Comment No.: **11**
Section: **2695.7(s)(1)**
Commentator: Personal Insurance Federation of California (PIF), Diane Colborn
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Proposed language exceeds the scope of authority granted to CDI, and is inconsistent with other statutory provisions that in some instances require insurers to utilize governmental data. Also, proposed language could encourage fraud, by requiring insurers who are “notified” by a claimant of an alleged inaccuracy in a government record to stop using the governmental data. The regulation lacks clarity because it fails to specific from whom the notification can be received, or what verification or proof of an alleged inaccuracy is to be required.

Response to comment: The Commissioner has considered the comment and accepts it. The language will be modified as follows:

(1) When establishing the value of a claim, insurers shall not be responsible for the accuracy of data provided by any governmental entity unless the insurer has discovered or been notified of the inaccuracy and continued to use the data.

Comment No.: **12**
Section: **2695.7(s)(1)**
Commentator: Association of California Insurance Companies, Samuel Sorich
Date of comment: 11/25/02
Type of comment: Written

Summary of comment: Similar to comments from CSAA in this subsection.

Response to comment: The Commissioner considered the comment and rejects it. See response to CSAA.

Subsection 2695.8(b)(1)(A)

Comment No.: **8**
Section: **2695.8(b)(1)(A)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The amendments proposed in this subsection fail to add any clarity. What is CDI's intention with respect to the new requirement that insurers provide contact information for the salvage dealer? Is this intended to give claimants an opportunity to change their mind and sell the salvage vehicle? Or is it intended to allow the claimant to verify the salvage deduction? The intent should be clarified.

Response to Comment: The Commissioner has considered the commentator's suggestion and responds as follows: The purpose of the amendment to this subsection is two-fold: (1) to allow the claimant to verify the salvage bid to determine the accuracy of the deduction and (2) to allow the claimant to determine whether the salvage vehicle should be retained by the claimant, relinquished to the insurer (in first party claims), or sold to the salvage dealer.

Subsection 2695.8(b)(2)

Comment No.: **12**
Section: **2695.8(b)(2)**
Commentator: Samuel Sorich, Association of California Insurance Companies/ National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The November 7 revision offers slight improvement to this section, but the revision fails to do anything to address the section's fundamental authority, necessity and reasonableness infirmities. This section would increase automobile costs at a time when many California drivers are already facing higher automobile insurance premiums.

Response: The Commissioner has considered the commentator's suggestion and rejects it. The commentator's comment is vague and it is unclear what specific portions of this section he takes issue with. The commissioner has the authority to ensure that consumers are being paid reasonable amounts in settlement of all insurance claims. This authority exists in California Insurance Code Section 790.03(h). Further, no evidence has been provided to support the contention that automobile costs will increase. These regulations have no bearing on the cost of automobiles on the open market.

Comment No.: **7**

Section: **2695.8(b)(2)**
Commentator: John Metz
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comments: The Commentator suggests that this subsection be changed to require that the cost of a comparable automobile be calculated "at the time the claimant actually obtains the settlement funds from the insurer to which the claimant and the insurer have agreed". This change is necessary to ensure that the cost of a comparable automobile included in the insurer's offer is based on the actual market value at the time the settlement is concluded and the claimant receives the money.

Response: The Commissioner has considered the commentator's suggestion and rejects it. Such a standard would not be practical as it would require insurers to recalculate and find new comparable vehicles several times during the negotiation process. Further, the settlement value of a total loss vehicle is its value at the time of the accident or insured event, not the time when the final settlement offer is made.

Subsection 2695.8(b)(3)

Comment No.: **11**
Section: **2695.8(b)(3)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California (PIFC)
Date of Comment: November 25, 2002
Type of Comment: Written Document Accompanying Oral Testimony

Summary of Comment: These changes add a new substantive requirement that the CDI have access to all records etc. used by the insurer to determine market value. This provision is impossible for insurers to comply with and would preclude insurers from using anything other than newspaper ads.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. This proposed subsection would not result is insurers using only newspaper ads. The commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Further, the commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Comment No.: **12**
Section: **2695.8(b)(3)**

Commentator: Samuel Sorich, Association of California Insurance Companies/ National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The November 7 revision would impose unreasonable obligations on insurers for which there is no statutory authority.

Response: The Commissioner has considered the commentator's suggestion and rejects. The commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Insurers may not use data that cannot be supported. Further, no information used by an insurer in transacting insurance business in this state is confidential as to the commissioner, no matter what the source. An insurer is not obliged to use third party data, but if an insurer chooses to use a third party vendor to provide data used to transact insurance business, the commissioner must have access to all information used. This amendment does not create new law, but clarifies and emphasizes the authority of the commissioner to examine all records, data and other information used by an insurer in transacting its insurance business. The commentator's suggested language would provide insurers with a mechanism with which to refuse to provide the department with requested information, claiming the vendor has not made it available to the insurer. Lastly, the commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Comment No.: **8**
Section: **2695.8(b)(3)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The proposed amendment in this subsection requires insurers to provide CDI access to "all records, data computer programs, or any other information used by the insurer or any other source to determine market value." Insurers frequently use data provided by third-party venders to determine market value of vehicles. The insurer is an end user of these databases, computer programs, publications, and other services. Insurers usually do not have access to the supporting data. Access would need to be provided by the respective vender(s). CDI access is also without reference to a market conduct examination or a consumer complaint investigation, This provision for access to records should be provided for in examination or enforcement rules. There is no statutory authority for this proposed language in the Fair Claims Practices enabling law. In addition to the lack of statutory authority, the proposed rule is inconsistent with the present statutory framework. In addition, proposed language that remains from the previous publication of these rules continues to suffer from a lack of clarity for the reasons previously stated.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. In reference to the necessity issue, the commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Further, the commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Comment No.: **3**
Section: **2695.8(b)(3)**
Commentator: Michael Cassanego, 21st Century Insurance Company
Date of Comment: November 22, 2002
Type of Comment: Written Document

Summary of Comment: CDI staff wants access to all records, data, computer programs or any other information used by the insurer or any other sources to determine market value. The CDI has no statutory authority to control sources such as CCC, ADP, Kelly Blue Book etc. This is not a technical change.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Further, the commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Comment No.: **9**
Section: **2695.8(b)(3)**
Commentator: Barger & Wolen LLP for 21st Century Insurance Company
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: This commentator states that there is no requirement that insurers take particular steps to verify comparable vehicle data. The amendment is ambiguous, as it does not clarify insurers' verification duty. Insurers are entitled to use any available evidence to evaluate the claim. The insured may dispute the amount, provide contrary evidence or invoke the appraisal provision of the policy.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review

all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Further, the commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Comment No.: **4**
Section: **2695.8(b)(3)**
Commentator: Mark S. Mester, Latham & Watkins, for CCC Information Services, Inc.
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comments: The commentator is concerned that the proposed language lacks sufficient clarity and the department has not justified the necessity for having access to all records. Much of the information is confidential, comprising trade secrets, proprietary programs and other sensitive information. Further, the amendments are procedurally impermissible and violate Government Code Section 11346.8(c).

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. Addressing the procedural issue, California Government Code Section states, in pertinent part:

"No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing (which refers to "proposed changes to the fair claims settlement practices regulations found at California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, Sections 2695.1 through .14") provides members of the directly affected public with notice that the subject changes could have resulted.

In reference to the necessity issue, the commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Insurers may not use data that cannot be supported. Further, no information used by an insurer in transacting insurance business in this state is confidential as to the commissioner, no matter what the source. An insurer is not obliged to use third party data, but if an insurer chooses to use a third party vendor to provide data used to transact insurance business, the commissioner must have access to all information used. The commissioner has the statutory authority (CIC Sections

730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Comment No.: **5**
Section: **2695.8(b)(3)**
Commentator: Jeffrey D. Hathaway, Interinsurance Exchange of the Automobile Club
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comments: The newly added second sentence imposes an unrealistic, if not impossible, burden on an insurer. It is not likely that an insurer will be able to access and provide much of the information to the department because such information would be treated as proprietary by the vendors. However, an insurer could reasonably be required to takes reasonable steps to verify the accuracy of the data. The newly added language could be changed to read: "Upon request, the department shall have access to all records...**used by and available to** the insurer..."

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects. The commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Insurers may not use data that cannot be supported. Further, no information used by an insurer in transacting insurance business in this state is confidential as to the commissioner, no matter what the source. An insurer is not obliged to use third party data, but if an insurer chooses to use a third party vendor to provide data used to transact insurance business, the commissioner must have access to all information used. This amendment does not create new law, but clarifies and emphasis the authority of the commissioner to examine all records, data and other information used by an insurer in transacting its insurance business. The commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee. The commentator's suggested language would provide insurers with a mechanism with which to refuse to provide the department with requested information, claiming the vendor has not made it available to the insurer.

Comment No.: **10**
Section: **2695.8(b)(3)**
Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The added language attempts to impose regulatory oversight on the business methods and contractual dealings of insurers with outside vendors and others in a manner not authorized by law or regulation. The regulation cannot and should not indirectly do

what a regulatory agency cannot do directly--affect the rights of entities it does not regulate. As such, the attempt is clearly substantive and should be the topic of debate at a public hearing.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. In reference to the authority issue, the commissioner has experienced significant difficulty in obtaining for review the evidence to support that insurers are reasonably valuing vehicles. Without the ability to review all records that are used to value a vehicle, the commissioner is unable to effectively determine whether values are reasonable and in compliance with law. Insurers may not use data that cannot be supported. Further, no information used by an insurer in transacting insurance business in this state is confidential as to the commissioner, no matter what the source. An insurer is not obliged to use third party data, but if an insurer chooses to use a third party vendor to provide data used to transact insurance business, the commissioner must have access to all information used. This amendment does not create new law, but clarifies and emphasis the authority of the commissioner to examine all records, data and other information used by an insurer in transacting its insurance business. The commissioner has the statutory authority (CIC Sections 730 and 734) to examine all books and records of any licensee and any other person or business if the information is material or necessary to the examination of the licensee.

Addressing the procedural issue, California Government Code Section states, in pertinent part:

"No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing (which refers to "proposed changes to the fair claims settlement practices regulations found at California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, Sections 2695.1 through .14") provides members of the directly affected public with notice that the subject changes could have resulted.

Subsection 2695.8(f)(2)

Comment No.: **8**
Section: **2695.8(f)(2)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The proposed amendment in this subsection is a substantial change, lacks clarity, lacks authority and is not sufficiently related to the original proposed rulemaking. For these reasons, the proposal should be republished to allow interested parties to comment in a

public hearing. Further, this change provides little value to consumers and will increase insurer costs.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. Addressing the procedural issue, California Government Code Section states, in pertinent part:

"No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing (which refers to "proposed changes to the fair claims settlement practices regulations found at California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, Sections 2695.1 through .14") provides members of the directly affected public with notice that the subject changes could have resulted.

In reference to the value to consumers, the commissioner has found, and based upon evidence presented in a recent Senate Insurance Committee hearing on auto body repair fraud, that most consumers are not provided with the ability to make an informed decision as to whether to use an insurer recommended shop or one of their choosing. Disclosure is necessary in order to protect the consumer's right to choose the repair shop. Further, no evidence has been presented to support the contention that insurer costs will increase as a result of this amendment.

Comment No.: **10**
Section: **2695.8(f)(2)**
Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The commentator is unclear what statutory authority authorizes this requirement. At the very least, this section should be modified to allow the written notice to be personally delivered to the claimant as an alternative to sending the written notice. Also, the 5-day notice period should be extended to 15 days.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The commissioner has found, and based upon evidence presented in a recent Senate Insurance Committee hearing on auto body repair fraud, that most consumers are not provided with the ability to make an informed decision as to whether to use an insurer recommended shop or one of their choosing. Disclosure is necessary in order to protect the consumer's right to choose the repair shop. While the Auto Body Repair Consumer Bill of Rights may be provided at different times, this is in addition to the written notice required by this subsection. The current and proposed regulations do require this written notice to be provided after the accident. In order

for the claimant to be more adequately informed of his or her rights we propose the amendment to this subsection.

In reference to a proposed modification to allow delivery of the notice, delivery of the notice would be equivalent to sending the notice, so no change to this subsection is warranted.

In reference to increasing the time period from 5 days to 15 days, this would defeat the purpose of the disclosure, which is to provide timely notice to the consumer so he or she may make an informed choice.

Comment No.: **3**
Section: **2695.8(f)(2)**
Commentator: Michael Cassanego, 21st Century Insurance Company
Date of Comment: November 22, 2002
Type of Comment: Written Document

Summary of Comment: CDI has added a new notice for insurers to send to their customers. No statutory authority is provided. The information is substantially the same as the Consumer Bill of Rights form, which the legislature mandated. Again, not a technical change.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The commissioner has found, and based upon evidence presented in a recent Senate Insurance Committee hearing on auto body repair fraud, that most consumers are not provided with the ability to make an informed decision as to whether to use an insurer recommended shop or one of their choosing. Timely disclosure is necessary in order to protect the consumer's right to choose the repair shop. While the Auto Body Repair Consumer Bill of Rights may be provided at different times, this is in addition to the written notice required by this subsection. The current and proposed regulations do require this written notice to be provided after the accident. In order for the claimant to be more adequately informed of his or her rights we propose the amendment to this subsection.

Comment No.: **12**
Section: **2695.8(f)(2)**
Commentator: Samuel Sorich, Association of California Insurance Companies/ National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: Insurance code section 1874.87 is the express statutory authority for the Auto Body Repair Consumer Bill of Rights which insurers must give to their insureds. The Legislature has provided no comparable authority for the written notice proposed in the November 7 revision. This information is also unnecessary and unreasonable.

Response: The Commissioner has considered the commentator's suggestion and rejects it. The commissioner has found, and based upon evidence presented in a recent Senate Insurance Committee hearing on auto body repair fraud, that most consumers are not provided with the

ability to make an informed decision as to whether to use an insurer recommended shop or one of their choosing. Disclosure is necessary in order to protect the consumer's right to choose the repair shop. While the Auto Body Repair Consumer Bill of Rights may be provided at different times, this is in addition to the written notice required by this subsection. The current and proposed regulations do require this written notice to be provided after the accident. In order for the claimant to be more adequately informed of his or her rights we propose the amendment to this subsection.

Comment No.: **11**
Section: **2695.8(f)(2)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California (PIFC)
Date of Comment: November 25, 2002
Type of Comment: Written Document Accompanying Oral Testimony

Summary of Comment: The changes add a new mandatory notice requirement not previously required or contemplated by either the existing regulations or the original proposed regulatory action. In addition to representing a major, substantive change, this mandatory notice requirement is without statutory authority. This notice is also duplicative of the Consumer Bill of rights notice and unnecessary.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The commissioner has found, and based upon evidence presented in a recent Senate Insurance Committee hearing on auto body repair fraud, that most consumers are not provided with the ability to make an informed decision as to whether to use an insurer recommended shop or one of their choosing. Disclosure is necessary in order to protect the consumer's right to choose the repair shop. While the Auto Body Repair Consumer Bill of Rights may be provided at different times, this is in addition to the written notice required by this subsection. The current and proposed regulations do require this written notice to be provided after the accident. In order for the claimant to be more adequately informed of his or her rights we propose the amendment to this subsection.

Subsection 2695.8(i)

Comment No.: **11**
Section: **2695.8(i)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California (PIFC)
Date of Comment: November 25, 2002
Type of Comment: Written Document Accompanying Oral Testimony

Summary of Comment: PIFC supports this change which deletes the prior language which attempted to dictate the rates paid by insurers to auto body shops and was without authority.

Response to Comment: The Commissioner considered the commentator's suggestion and the subsection was edited in the prior amendment period to delete the language in proposed section 2695.8(i) that referred to the "prevailing rate."

Subsection 2695.8(m)

Comment No.: **11**
Section: **2695.8(m)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California (PIFC)
Date of Comment: November 25, 2002
Type of Comment: Written Document Accompanying Oral Testimony

Summary of Comment: The changes add a new requirement relative to towing and storage charges on both first party and third party claims. The change dictates that the insurance policy must include coverage for towing and storage charges. This requirement is without statutory authority. With respect to third party claims, the change adds new language setting forth requirements without regard to policy limits or the amount of property damage liability coverage available. This requirement is without statutory authority.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects. This proposed amendment does not dictate policy language. All automobile insurance policies contain a clause that places an affirmative duty on the insured to protect the vehicle from further loss. As an example, a certain major insurer places a duty upon the insured to ***"protect the damaged vehicle. We will pay any reasonable expense incurred to do it."*** Other insurers have a similar provision. Courts have consistently held that in the presence of such a clause, the insured may recover expenses including storage and towing costs incurred to protect the vehicle from further loss. (See Couch on Insurance, § 54:174; Appleman's §3885; and 7A Am Jur 2d § 424). It is currently industry practice to pay reasonable towing and storage charges as part of the standard automobile physical damage insurance coverage offered to insureds. However, some insurers ignore this portion of the policy and deny or reduce claims for towing and storage expenses.

Further, as stated in 7A Am Jur 2d § 424, even in the absence of a "protection of property" clause, it has been held that an insured is entitled to reimbursement from the insurer for costs incurred in protecting against further loss after the insured vehicle has been in an accident. (See 9th Circuit Court of Appeals case, 306 F2nd 661). In this regard it has been said that, an insured must do everything reasonable to minimize the amount of the loss and that, having so minimized the loss, the insured is entitled to the amount expended by it for the benefit of the insurer.

The CDI is not mandating policy terms. The relevant policy terms already exist. When insureds purchase automobile coverage they have a reasonable expectation that certain minimum expenses will be covered in the event of a loss, such as towing and storage charges. The proposed amendment to 2695.8(m) sets forth the minimum claims standard in paying the reasonable towing and storage charges incurred in performing the duty to protect the vehicle, as supported by case law. CIC Section 790.03(h)(1) prohibits an insurer from misrepresenting insurance policy provisions relating to coverage. By denying or reducing claims for towing and storage (in the presence of the duty-to-protect clause) the insurer is misrepresenting its policy provisions.

In reference to the third party claim, this proposed section does not require payment over-and-above the policy limit. All claims payments to a third party claimant are subject to policy limits. This subsection does not contradict this limitation.

Comment No.: **8**
Section: **2695.8(m)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The section contains a substantial change in the proposed rule from the previous proposal, lacks authority, lacks clarity and is not sufficiently related to the original rulemaking action. CDI does not have the authority to compel insurers to pay towing and storage charges to its insureds. The proposed language would require insurers to pay the towing and storage charges of a claimant on any claim. This requirement is not authorized by statute and it lacks clarity.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The proposed language does not require payment of towing and storage charges of a claimant on any claim. All automobile insurance policies contain a clause that places an affirmative duty on the insured to protect the vehicle from further loss. As an example, a certain major insurer places a duty upon the insured to ***"protect the damaged vehicle. We will pay any reasonable expense incurred to do it."*** Other insurers have a similar provision. Courts have consistently held that in the presence of such a clause, the insured may recover expenses including storage and towing costs incurred to protect the vehicle from further loss. (See Couch on Insurance, § 54:174; Appleman's §3885; and 7A Am Jur 2d § 424). It is currently industry practice to pay reasonable towing and storage charges as part of the basic automobile physical damage insurance coverage offered to insureds. However, some insurers ignore this portion of the policy and deny or reduce claims for towing and storage expenses.

Further, as stated in 7A Am Jur 2d § 424, even in the absence of a "protection of property" clause, it has been held that an insured is entitled to reimbursement from the insurer for costs incurred in protecting against further loss after the insured vehicle has been in an accident. (See 9th Circuit Court of Appeals case, 306 F2nd 661). In this regard it has been said that, an insured must do everything reasonable to minimize the amount of the loss and that, having so minimized the loss, the insured is entitled to the amount expended by it for the benefit of the insurer.

The CDI is not mandating policy terms. The relevant policy terms already exist. When insureds purchase automobile coverage they have a reasonable expectation that certain minimum expenses will be covered in the event of a loss, such as towing and storage charges. The proposed amendment to 2695.8(m) sets forth the minimum claims standard in paying the reasonable towing and storage charges incurred in performing the duty to protect the vehicle, as supported by case law. CIC Section 790.03(h)(1) prohibits an insurer from misrepresenting insurance policy provisions relating to coverage. By denying or reducing claims for towing and

storage (in the presence of the duty-to-protect clause) the insurer is misrepresenting its policy provisions.

Addressing the procedural issue, California Government Code Section states, in pertinent part:

"No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing (which refers to "proposed changes to the fair claims settlement practices regulations found at California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, Sections 2695.1 through .14") provides members of the directly affected public with notice that the subject changes could have resulted.

Comment No.: **10**
Section: **2695.8(m)**
Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: This section continues to exceed statutory authority, in that a regulation cannot dictate what provisions must be included in an insurance policy. With respect to third party claims the proposed language exceeds statutory authority because it would require payment of all such charges even if the stated policy limits have been exhausted through prior payment.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects. This proposed amendment does not dictate policy language. All automobile insurance policies contain a clause that places an affirmative duty on the insured to protect the vehicle from further loss. As an example, a certain major insurer places a duty upon the insured to ***"protect the damaged vehicle. We will pay any reasonable expense incurred to do it."*** Other insurers have a similar provision. Courts have consistently held that in the presence of such a clause, the insured may recover expenses including storage and towing costs incurred to protect the vehicle from further loss. (See Couch on Insurance, § 54:174; Appleman's §3885; and 7A Am Jur 2d § 424). It is currently industry practice to pay reasonable towing and storage charges as part of the standard automobile physical damage insurance coverage offered to insureds. However, some insurers ignore this portion of the policy and deny or reduce claims for towing and storage expenses.

Further, as stated in 7A Am Jur 2d § 424, even in the absence of a "protection of property" clause, it has been held that an insured is entitled to reimbursement from the insurer for costs incurred in protecting against further loss after the insured vehicle has been in an accident. (See

9th Circuit Court of Appeals case, 306 F2nd 661). In this regard it has been said that, an insured must do everything reasonable to minimize the amount of the loss and that, having so minimized the loss, the insured is entitled to the amount expended by it for the benefit of the insurer.

The CDI is not mandating policy terms. The relevant policy terms already exist. When insureds purchase automobile coverage they have a reasonable expectation that certain minimum expenses will be covered in the event of a loss, such as towing and storage charges. The proposed amendment to 2695.8(m) sets forth the minimum claims standard in paying the reasonable towing and storage charges incurred in performing the duty to protect the vehicle, as supported by case law. CIC Section 790.03(h)(1) prohibits an insurer from misrepresenting insurance policy provisions relating to coverage. By denying or reducing claims for towing and storage (in the presence of the duty-to-protect clause) the insurer is misrepresenting its policy provisions.

In reference to the third party claim, this proposed section does not require payment over-and-above the policy limit. All claims payments to a third party claimant are subject to policy limits. This subsection does not contradict this limitation.

Comment No.: **12**
Section: **2695.8(m)**
Commentator: Samuel Sorich, Association of California Insurance Companies/National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The November 7 revision retains the unauthorized proposal that an insurer "shall" pay towing and storage charges incurred by the insured. There is no California statute which requires an automobile insurer to provide coverage for towing and storage. The Department has no authority to impose these coverage obligations on insurers through regulation. When an insured purchases a liability-only policy, the policy provides no coverage for towing and storing the insured's vehicle. The department does not have the authority to create coverage through regulation. In reference to third party claims, the department does not have the authority to impose payment of damages over and above the policy limits.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The intent of the proposed language is supported by statutory authority and case law. All automobile insurance policies contain a clause that places an affirmative duty on the insured to protect the vehicle from further loss. As an example, a certain major insurer places a duty upon the insured to ***"protect the damaged vehicle. We will pay any reasonable expense incurred to do it."*** Other insurers have a similar provision. Courts have consistently held that in the presence of such a clause, the insured may recover expenses including storage and towing costs incurred to protect the vehicle from further loss. (See Couch on Insurance, § 54:174; Appleman's §3885; and 7A Am Jur 2d § 424). It is currently industry practice to pay reasonable towing and storage charges as part of the standard automobile physical damage insurance

coverage offered to insureds. However, some insurers ignore this portion of the policy and deny or reduce claims for towing and storage expenses.

Further, as stated in 7A Am Jur 2d § 424, even in the absence of a "protection of property" clause, it has been held that an insured is entitled to reimbursement from the insurer for costs incurred in protecting against further loss after the insured vehicle has been in an accident. (See 9th Circuit Court of Appeals case, 306 F2nd 661). In this regard it has been said that, an insured must do everything reasonable to minimize the amount of the loss and that, having so minimized the loss, the insured is entitled to the amount expended by it for the benefit of the insurer.

When insureds purchase automobile coverage they have a reasonable expectation that certain minimum expenses will be covered in the event of a loss, such as towing and storage charges. The proposed amendment to 2695.8(m) sets forth the minimum claims standard in paying the reasonable towing and storage charges incurred in performing the duty to protect the vehicle, as supported by case law. CIC Section 790.03(h)(1) prohibits an insurer from misrepresenting insurance policy provisions relating to coverage. By denying or reducing claims for towing and storage (in the presence of the duty-to-protect clause) the insurer is misrepresenting its policy provisions.

Further, these regulations do not require an insurer to provide towing and storage coverage on liability-only policies.

In reference to the third party claim, this proposed section does not require payment over-and-above the policy limit. All claims payments to a third party claimant are subject to policy limits. This subsection does not contradict this limitation.

Comment No.: **9**
Section: **2695.8(m)**
Commentator: Barger & Wolen LLP for 21st Century Insurance Company
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The Act does not authorize the Department to mandate that insurers cover towing and storage costs, and there is no public policy reasons to require insurers to pay these costs.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it in part and accepts it in part. While broadly written, the intent of the proposed language is supported by statutory authority and case law. The proposed language does not require payment of towing and storage charges for mechanical breakdown. All automobile insurance policies contain a clause that places an affirmative duty on the insured to protect the vehicle from further loss. As an example, a certain major insurer places a duty upon the insured to ***"protect the damaged vehicle. We will pay any reasonable expense incurred to do it."*** Other insurers have a similar provision. Courts have consistently held that in the presence of such a clause, the insured may recover expenses including storage and towing costs incurred to protect the vehicle from further loss. (See Couch on Insurance, § 54:174; Appleman's §3885; and 7A Am Jur 2d §

424). It is currently industry practice to pay reasonable towing and storage charges as part of the standard automobile physical damage insurance coverage offered to insureds. However, some insurers will ignore this portion of the policy and deny or reduce claims for towing and storage expenses.

Further, as stated in 7A Am Jur 2d § 424, even in the absence of a "protection of property" clause, it has been held that an insured is entitled to reimbursement from the insurer for costs incurred in protecting against further loss after the insured vehicle has been in an accident. (See 9th Circuit Court of Appeals case, 306 F2nd 661). In this regard it has been said that, an insured must do everything reasonable to minimize the amount of the loss and that, having so minimized the loss, the insured is entitled to the amount expended by it for the benefit of the insurer.

The CDI is not mandating policy terms. The relevant policy terms already exist. When insureds purchase automobile coverage they have a reasonable expectation that certain minimum expenses will be covered in the event of a loss, such as towing and storage charges. The proposed amendment to 2695.8(m) sets forth the minimum claims standard in paying the reasonable towing and storage charges incurred in performing the duty to protect the vehicle, as supported by case law. CIC Section 790.03(h)(1) prohibits an insurer from misrepresenting insurance policy provisions relating to coverage. By denying or reducing claims for towing and storage (in the presence of the duty-to-protect clause) the insurer is misrepresenting its policy provisions.

Also, under an auto liability policy, the insurer is required to pay what the insured is legally liable for. California Civil Code Section 3333 states:

> 3333. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

In third party automobile liability cases, this civil code section has been applied to require payment of reasonable towing and storage charges proximately caused by the negligent party. This proposed section does not require payment over-and-above the policy limit. All claims payments to a third party claimant are subject to policy limits.

Subsection 2695.85(c)

Comment No.: **11**
Section: **2695.85(c)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California (PIFC)
Date of Comment: November 25, 2002
Type of Comment: Written Document Accompanying Oral Testimony

Summary of Comment: This section modifies the Auto Body Consumer Bill of Rights form that insurers are required to provide to claimants. Section 3 of the form is modified to provide

that every insurer shall pay reasonable towing and storage charges. This provision, like subsection 2695.8(m) is without statutory authority and is inconsistent with Insurance Code Section 1874.87. That section provides that the bill of rights shall include information about the consumer's right to be informed about coverage for towing services, but does not require that insurers provide towing services as a mandated coverage.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. See the response to Section 2695.8(m), above. The CDI is not requiring insurers to include such language in auto policies. Such language requiring an insured to protect the damaged auto from further loss already exists in most, if not all, auto policies.

Comment No.: **8**
Section: **2695.85(c)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The section contains a substantial change in the proposed rule from the previous proposal, lacks authority, lacks clarity and is not sufficiently related to the original rulemaking action. CDI not have the authority to compel insurers to pay towing and storage charges to its insureds. The proposed language would require insurers to pay the towing and storage charges of a claimant on any claim. This requirement is not authorized by statute and it lacks clarity.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. The Department has the authority to for this proposed language. As noted above, the relevant policy terms already exist. The proposed amendment to 2695.85(c) mirrors the standard set forth in Section 2695.8(m) and provides notice to the insured as to what expenses are covered.

Addressing the procedural issue, California Government Code Section states, in pertinent part:

"No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action" (emphasis added.)

Although the proposed revisions are substantial, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42 so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002 Notice of Proposed Action and Notice of Proposed Hearing (which refers to "proposed changes to the fair claims settlement practices regulations found at California Code of Regulations, Title 10, Chapter 5, Subchapter 7.5, Sections 2695.1 through .14") provides members of the directly affected public with notice that the subject changes could have resulted.

Comment No.: **12**
Section: **2695.85(c)**
Commentator: Samuel Sorich, Association of California Insurance Companies/National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: This section is being revised essentially indicating an insurer must pay towing and storage to protect a customer's vehicle. No statutory authority exists to require insurers to include such language in auto policies.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. See the response to Section 2695.8(m), above. The CDI is not requiring insurers to include such language in auto policies. Such language requiring an insured to protect the damaged auto from further loss already exists in most, if not all, auto policies.

Comment No.: **9**
Section: **2695.85(c)**
Commentator: Barger & Wolen LLP for 21st Century Insurance Company
Date of Comment: November 25, 2002
Type of Comment: Written Document

Summary of Comment: The amendment does not address the fundamental problem with the proposed amendment - that it improperly dictates policy provisions.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. See the response to Section 2695.8(m), above. The CDI is not requiring insurers to include such language in auto policies. Such language requiring an insured to protect the damaged auto from further loss already exists in most, if not all, auto policies.

Comment No.: **3**
Section: **2695.85(c)**
Commentator: Michael Cassanego, 21st Century Insurance Company
Date of Comment: November 22, 2002
Type of Comment: Written Document

Summary of Comment: This section is being revised essentially indicating an insurer shall pay towing and storage to protect a customer's vehicle. No statutory authority exists to require insurers to include such language in auto policies. Again, not a technical change.

Response to Comment: The Commissioner has considered the commentator's suggestion and rejects it. See the response to Section 2695.8(m), above. The CDI is not requiring insurers to include such language in auto policies. Such language requiring an insured to protect the damaged auto from further loss already exists in most, if not all, auto policies.

Section 2695.10, generally

Comment No.: **13**
Section: **2695.10**
Commentator: **Sedgwick, Detert, Moran & Arnold, Surety Association of America**
Date of comment: **11/25/02**
Type of comment: **Written**

Summary of comment: Proposed regulations are more burdensome for surety insurers than other insurers and impossible to comply with. There are several comments in this subsection.

Response to comment: The Commissioner has considered the comment and rejects it. The comment is outside the scope of the rulemaking.

SECTION 2695.11

Section 2695.11(e)

Comment No. 8

Commentator: Steve McManus, State Farm Insurance Companies
Date: November 25, 2002
Type of Comment: Written
Also commented by: Michael J. Cassanego, 21st Century Insurance Company
Date: November 22, 2002
Type of Comment: Written

Summary of Comment: Some of the changes made in the proposal are substantial and go beyond the reasonable expectations of interested parties providing comments on the originally proposed regulations.

Response to Comment: The commissioner has considered the comment and rejects it. California Government Code Section 11346.8(c) states, in pertinent part:

> No state agency may adopt, amend or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately place on notice that the change could result from the originally proposed regulatory action. (Emphasis added.)

Although the proposed revisions are substantive, they are also "sufficiently related changes" as defined in Title 1, California Code of Regulations, Section 42, so as to satisfy the second prong of Government Code Section 11346.8(c). The Department's March 15, 2002, Notice of Proposed Action and Notice of Proposed Hearing provides members of the directly affected public with notice that the subject changes could have resulted.

Comments RE: Section 2695.12

Comment No.: **12**
Section: **2695.12(a)(14)**
Commentator: Samuel Sorich, National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: This revision limits the consideration of reasonable mistakes to determining penalties. The limitation is inconsistent with the Insurance Code. The consideration of reasonable mistakes should apply to both the determination of whether a violation occurred and the determination of appropriate penalties.

Response to Comment: The Commissioner has considered this comment and rejects it. If an act is not in compliance with the regulations, it is necessarily in violation of the regulations. The fact that a mistake was reasonable goes to the issue of what penalty, if any, should be assessed, not whether the violation occurred.

Comment No.: **11**
Section: **2695.12**
Commentator: G. Diane Colborn, Personal Insurance Federation of California
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: This section should be amended to clarify that reasonable mistakes or opinions shall not form the basis for determining that a licensee was noncompliant or shall be a mitigating factor in determining penalty amount.

Response to Comment: The Commissioner has considered this comment and accepts it in part and rejects it in part. If an act is not in compliance with the regulations, it is necessarily in violation of the regulations. However, the fact that a mistake or opinion was reasonable goes to the issue of what penalty, if any, should be assessed.

Comment No.: **9**
Section: **2695.12**
Commentator: Kent Keller, Barger & Wolen
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The amendments improperly eliminate the concept of noncompliance with the regulations (which can occur in particular cases without penalty) as contrasted with a "violation" of the Unfair Practices Act itself, which requires a finding of a knowing general business practice.

Response to Comment: The Commissioner has considered this comment and rejects it. If an act is not in compliance with the regulations, it is necessarily in violation of the regulations. Mitigating factors, such as whether the noncompliant act resulted from a reasonable mistake, will be considered in determining what penalty, if any, should be assessed.

Summary of Comment: The factors set forth in this subsection overlap and conflict with proposed enforcement and penalty regulations recently proposed by the Department.

Response to Comment: The Commissioner has considered this comment and rejects it. The regulations do not conflict.

Comments RE: Section 2695.14(a)

Comment No.: **12**
Section: **2695.14(a)**
Commentator: Samuel Sorich, National Association of Independent Insurers
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: The proposed 90 day effective date is inadequate. At a minimum, the effective date of the proposed amendments should be 120 days after the amendments are filed with the Secretary of State.

Response to Comment: The Commissioner has considered this comment and rejects it. Ninety days is more than enough time for insurers to make the changes in their claims practices resulting from the amendments.

Comment No.: **11**
Section: **2695.14(a)**
Commentator: G. Diane Colborn, Personal Insurance Federation of California
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comment: Insurers should have at least 120 days for compliance.

Response to Comment: The Commissioner has considered this comment and rejects it. Ninety days is sufficient time for insurers to make the necessary changes in their claims practices as a result of the amendments.

Comment No.: **9**
Section: **2695.14(a)**
Commentator: Kent Keller, Barger & Wolen
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comments: Insurers should have 120 days to comply with the amendments.

Response to Comment: The Commissioner has considered this comment and rejects it. Ninety days is sufficient for insurers to make the necessary changes in their claims practices as a result of the amendments.

Comment No.: **8**
Section: **2695.14(a)**
Commentator: Steve McManus, State Farm Insurance Companies
Date of Comment: November 25, 2002
Type of Comment: Written

Summary of Comments: Insurers should have 120 days to comply with the amendments.

Response to Comment: The Commissioner has considered this comment and rejects it. Ninety days is sufficient time for insurers to make the necessary changes in their claims practices as a result of the amendments.